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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CARY MICHAEL LAMBRIX,

Petitioner,

vs.

HARRY K. SINGLETARY, JR., Secretary,
Florida Department of Corrections,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER*
ERIC L. CHRISTOFFERSEN
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

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QUESTION PRESENTED

Is the rule of *Espinosa* v. *Florida* a "new rule" within the meaning of *Teague* v. *Lane*?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a proceeding conducted many years ago, involving no substantial question of whether petitioner is actually guilty. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

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1. Both parties have given written consent to the filing of this brief.

SUMMARY OF FACTS AND CASE

On February 5, 1983, petitioner Cary Lambrix and his roommate, Frances Smith, met the victims, Clarence Moore and Aleisha Bryant, at a local tavern. Late that evening, the two couples retired to Lambrix's trailer for a meal. Shortly thereafter, Lambrix and Moore went outside. Lambrix returned about 20 minutes later and requested Bryant to go outside with him. About 45 minutes later, Lambrix, with blood on his person and clothing, returned to the trailer carrying a tire tool. Lambrix told Smith that he had killed both Moore and Bryant. Lambrix indicated that he had choked and stomped on Bryant and had hit Moore over the head. *Lambrix* v. *State*, 494 So. 2d 1143, 1145 (Fla. 1986).

On February 27, 1984, Lambrix was convicted of two counts of first-degree murder. Joint Appendix ("J. A.") 1. At sentencing, the trial judge gave the jury the standard instruction on Florida's heinous, atrocious, or cruel aggravating factor. J. A. 8. The judge refused Lambrix's request to give the jury a more detailed instruction. J. A. 3-6. The jury returned a recommendation of death. *Lambrix* v. *State*, 494 So. 2d, at 1145.

The trial judge found five aggravating circumstances: (1) murder by a person sentenced to imprisonment, based on Lambrix's escape from custody; (2) conviction of another capital felony, based on multiple murder in the present case; (3) murder for pecuniary gain; (4) "especially heinous and atrocious"; and (5) "cold, calculated and premeditated." J. A. 20. The trial judge found no mitigating circumstances. J. A. 21.

Lambrix's convictions and death sentences were affirmed by the Florida Supreme Court on September 25, 1996. *Lambrix* v. *State*, 494 So. 2d, at 1148. The Florida Supreme Court also denied Lambrix's collateral challenges to his convictions and sentences. *Lambrix* v. *Dugger*, 529 So. 2d 1110, 1112 (1988); *Lambrix* v. *State*, 534 So. 2d 1151, 1154 (1988); *Lambrix* v. *State*, 559 So. 2d 1137, 1138 (1990).

Lambrix petitioned the federal District Court for a writ of habeas corpus. The District Court denied the petition on May 12, 1992, and Lambrix appealed to the Eleventh Circuit Court of Appeals. *Lambrix* v. *Singletary*, 72 F. 3d 1500, 1502 (CA11 1996). While the appeal was pending, this Court decided

Espinosa v. *Florida*, 505 U. S. 1079 (1992). Lambrix then presented a claim based on *Espinosa* to the Florida state courts. On June 16, 1994, the Florida Supreme Court denied relief on Lambrix's *Espinosa* claims because they were procedurally barred. *Lambrix* v. *Singletary*, 641 So. 2d 847, 848 (1994). Finally, the Eleventh Circuit affirmed the decision of the District Court on Lambrix's habeas petition. *Lambrix* v. *Singletary*, 72 F. 3d, at 1508. The court rejected Lambrix's attack on the jury instructions for the "especially heinous, atrocious, or cruel" aggravating factor. Relying on *Glock* v. *Singletary*, 65 F. 3d 878 (CA11 1995) (en banc), the court held that Lambrix's *Espinosa* claims were barred by *Teague* v. *Lane*, 489 U. S. 288 (1989). *Lambrix* v. *Singletary*, 72 F. 3d, at 1503.

SUMMARY OF ARGUMENT

The present case does not turn on when "*Godfrey* error" may be harmless but rather on what is *Godfrey* error in the first place. In 1986, when petitioner's sentence became final, the Florida courts and the Eleventh Circuit were well within the bounds of reasonable interpretation to believe that application of the narrowed definition of the aggravating circumstance at *any* point in the system was sufficient to comply with *Godfrey*.

This Court's jurisprudence under *Furman* v. *Georgia*, *Gregg* v. *Georgia*, and their progeny sets forth a set of rules intended to make the imposition of capital punishment more regular and less arbitrary. However, the constant changing of those rules is, at this point, causing more arbitrariness than it cures. Vigorous application of the "new rule" doctrine of *Teague* is needed to prevent the cure from being worse than the disease.

Petitioner's arguments other than the *Espinosa* question are not properly before the Court, are procedurally defaulted, and are without merit.

ARGUMENT

I. The key question is not whether error was "cured" but whether the procedure used was error at all under 1986 precedent.

The key to the present case lies in the statement of the question. Petitioner insists that the case is simply about the use of an "invalid" factor, and therefore the answer follows from *Stringer* v. *Black*, 503 U. S. 222 (1992). Brief for Petitioner 11, 17. If the question were that simple, he would be right. It is not.

"A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934). The label "invalid aggravating circumstance" has been more tyrannical than most. Labels, like metaphors, bear careful watching lest they enslave thought instead of liberating it. See *First Nat. City Bank* v. *Banco Para El Comercio*, 462 U. S. 611, 623 (1983) (quoting *Berkey* v. *Third Avenue R. Co.*, 155 N. E. 58, 61 (N.Y. 1926) (Cardozo, J.)).

Simply condemning a factor as "invalid" and then rooting it out whenever it appears is far too simplistic. "[I]t is essential to keep in mind the sense in which [the challenged] aggravating circumstance is 'invalid.' " *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983). A factor which is invalid for one purpose may be perfectly valid for another.

"Aggravating" factors are used for two distinct purposes in post-*Furman* capital sentencing: "the eligibility decision and the selection decision." *Tuilaepa* v. *California*, 129 L. Ed. 2d 750, 759, 114 S. Ct. 2630, 2634 (1994). Eligibility factors narrow the class of defendants subject to capital punishment, while selection factors are the instruments of individualized sentencing within that narrowed class. *Id.*, at 759-760, 114 S. Ct., at 2635. Given those different, indeed "somewhat contradictory" functions, see *id.*, at 760, 114 S. Ct., at 2635, it would be surprising indeed if the inadequacy of a factor to perform the first function were to render it *per se* invalid for the second.

We can put to one side, for this purpose, those factors which are invalid in the sense that their use violates some other right of the defendant, such as the First Amendment. See, *e.g.*, *Dawson* v. *Delaware*, 503 U. S. 159, 168 (1992). We can also put aside contentions that a particular factor is simply irrelevant or diminishes the jury's sense of responsibility. See, *e.g.*, *Romano* v. *Oklahoma*, 129 L. Ed. 2d 1, 16, 114 S. Ct. 2004, 2014 (1994) (Ginsburg, J., dissenting). No factor of either kind is involved in the present case. Cf. *Zant* v. *Stephens*, 462 U. S., at 885.

The present case involves a statutory factor that on its face is *inadequate* to perform the narrowing function, but that as narrowly construed by the Florida Supreme Court *is* adequate to perform that function. Both of these propositions were settled 20 years ago. *Proffitt* v. *Florida*, 428 U. S. 242, 255-256 (1976) (lead opinion), citing *State* v. *Dixon*, 283 So. 2d 1, 9 (1973).

The idea that vague factors are also a problem when used for the selection step, however, is one of much more recent vintage. *Gregg* v. *Georgia*, 428 U. S. 153, 203-204 (1976) rejected the contention that wide-open evidence and argument was unconstitutional, and that holding has been reaffirmed repeatedly. See, *e.g.*, *Zant*, 462 U. S., at 886-887; *Tuilaepa*, 129 L. Ed. 2d, at 763-764, 114 S. Ct., at 2638.

In *Zant*, the use of a vague circumstance was harmless for eligibility because other valid factors supported that determination. 462 U. S., at 879. Addressing whether the instruction was harmless for selection, *Zant* found it "appropriate to compare the instruction that was actually given . . . with an instruction on the same subject that would have been unobjectionable." *Id.*, at 888.

The instruction actually given was "propositional." Cf. *Tuilaepa*, 129 L. Ed. 2d, at 761, 114 S. Ct., at 2636. It asked, yes or no, whether Stephens had a "substantial history of serious assaultive criminal convictions." 462 U. S., at 866. *Zant* compared this to a nonpropositional instruction on criminal history that would have been valid, *id.*, at 888, and found the difference between the two did not rise to "a constitutional defect in the sentencing process." *Id.*, at 889.

Zant then withheld judgment on whether its rule would apply "under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances . . . ." *Id.*, at 890. From that point until

Tuilaepa, the key difference was thought to be whether the sentencer does or does not "weigh." See, *e.g.*, *Richmond* v. *Lewis*, 506 U. S. 40, 47-48 (1992). Yet in reality *all* sentencers "weigh." A process that considers aggravating and mitigating circumstances must necessarily "weigh" them against each other. Indeed, *Zant* itself refers to the "weight" the jury may have given to Stephens' criminal record. 462 U. S., at 888.

The thesis that "weighing" is not the critical distinction is confirmed by *Tuilaepa*. California juries are instructed to "weigh" in the same sense as Florida juries. Compare CALJIC No. 8.88 (1996 Supp.) with J. A. 15.[2] Even so, the use of a wide-open but "nonpropositional" factor such as "circumstances of the offense" does not create the risk of randomness found in *Stringer*. *Tuilaepa*, 129 L. Ed. 2d, at 761, 114 S. Ct., at 2636.

Before proceeding further, then, it would be helpful for the Court to spell out what *Stringer* and *Tuilaepa* only imply. *Amicus* submits that the *Stringer* dissent had this point right.

> "The mere fact that an aggravating circumstance inclines a sentencer more towards imposing the death penalty cannot, of course, violate the Eighth Amendment. I therefore read the majority opinion to object to the weighing of vague aggravating circumstances only because they skew the operation of the scheme by their *random application from case to case*." *Stringer*, 503 U. S., at 243, n. 2 (Souter, J., dissenting) (emphasis added).

Suppose that instead of the "especially heinous" instruction, Lambrix's jury had been given a nonpropositional one. Cf. *Zant*, 462 U. S., at 888. "In addition to the aggravating and mitigating factors listed, you may also consider the heinousness of the offense. All murders are heinous, but some more so than

2. "[T]he 'nonweighing'/'weighing' distinction logically and conceptually is better understood as a 'nonlimiting'/'limiting' distinction; that is, what differentiates a 'non-weighing' from a 'weighing' statutory scheme is not what *weight* is placed on aggravating circumstances, but rather whether the jury is *limited* to considering only statutory aggravating factors in deciding whether to impose a sentence of death." *Flamer* v. *Delaware*, 68 F. 3d 736, 766-767 (CA3 1995) (Lewis, J., dissenting) (emphasis in original).

others. To the extent this one is more heinous than average, you should consider that in aggravation. To the extent it is less so, you should consider that in mitigation." This "nonpropositional" factor is as relevant and understandable as the one upheld in *Tuilaepa*, 129 L. Ed. 2d, at 762, 114 S. Ct., at 2637, and hence would be valid. It would be applied in every case and not randomly from case to case.

The problem is that Florida and Mississippi juries are not given broad, nonpropositional circumstances like those in Georgia or California. They are limited on the aggravating side to only those factors they have found true. Hence, a jury in one case will consider heinousness in the mix while the jury in another case will not, based on the jurors' unguided and possibly idiosyncratic assessment of what is "especially heinous." That is randomness.

In Florida, though, unlike Mississippi, the trial judge makes independent findings of the circumstances. The danger of randomness is considerably dampened by this additional procedure. If the trial judge applies the *Dixon* definition, as he is presumed to do, then the judge's finding that the circumstance is true serves to assure that the danger feared in *Stringer* did not occur in the particular case. That is, the jury weighed the "especially heinous" factor not because of an unduly sensitive definition of "heinousness" but because the individual facts of the case do, indeed, meet the *Dixon* definition. *Espinosa* does not discuss this facet of the problem.

The question before the Supreme Court of Florida when it decided *Smalley* v. *State*, 546 So. 2d 720 (1989), was whether the *Dixon* language needed to be read to the jury, or whether its application by the trial and appellate courts was sufficient to meet the requirements of *Furman* v. *Georgia*, 408 U. S. 238 (1972), *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) (plurality), and *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). The Florida court decided that judicial application met the requirement. 546 So. 2d, at 722.

This holding, and the reasonableness of it, forms a fundamental difference between this case and *Stringer* v. *Black*, 503 U. S. 222 (1992). In Mississippi, as in Georgia and Oklahoma, the jury, not the judge, makes the finding of the "eligibility"

circumstances. See *id.*, at 229. Stringer's jury was instructed with a circumstance with no more tangible content than the one in *Godfrey* and identical to the language deemed facially overbroad in *Proffitt*. See *id.*, at 226, 228. Like *Godfrey*, and unlike *Proffitt*, no narrowing construction had been applied by the trial judge or on appeal. See *id.*, at 226 (describing holdings on appeal). *Stringer*, therefore, was a case of clear *Godfrey* error,[3] and the principal question involved the applicability of the harmless error rule of *Zant* v. *Stephens*, 462 U. S. 862 (1983). See *Stringer*, 503 U. S., at 244 (Souter, J., dissenting).

Smalley is not a harmless error case. It does not rest on *Zant* v. *Stephens*. *Smalley* held that, because of differences between Florida's and the other states' systems, instructing the jury in the bare words of the statute was not constitutional error at all. 546 So. 2d, at 722. The Eleventh Circuit reached the same conclusion the same year. *Bertolotti* v. *Dugger*, 883 F. 2d 1503, 1526-1527 (1989).

The question here is whether contrary holdings in *Smalley* and *Bertolotti* were *dictated* by precedent before *Stringer* and *Espinosa*, such that the question was not susceptible to debate among reasonable minds. See *Teague* v. *Lane*, 489 U. S. 288, 301 (1989); *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990).

II. *Espinosa* v. *Florida* created a new rule.

> " '[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.' *Teague* v. *Lane*, [489 U. S. 288], at 301 [(1989)]. In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for

3. More precisely, it was clear *Godfrey* error once the state-specific question of whether the *Godfrey* vagueness rule applied to the "aggravating circumstances" or the definition of "capital murder" had been answered. See *id.*, at 232-235. This point is discussed further in part II B, *infra*, at 16-18.

> *Teague* purposes. Second, the court must '[s]urve[y] the legal landscape as it then existed,' [citation] and 'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.' [Citation.] Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle. [Citation.]" *Caspari* v. *Bohlen*, 510 U. S. 383, 390 (1994).

The first step is undisputed. Petitioner's conviction and sentence became final on November 24, 1986. Brief for Petitioner 5-6. This was after *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) (plurality), *Zant* v. *Stephens*, 462 U. S. 862 (1983), and *Cabana* v. *Bullock*, 474 U. S. 376 (1986), but before *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), *Stringer* v. *Black*, 503 U. S. 222 (1992), *Espinosa* v. *Florida*, 505 U. S. 1079 (1992), and *Tuilaepa* v. *California*, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994).

The cases in this area have grappled with three distinct but related questions: (1) what factors are "invalid" for what purposes; (2) where a limiting construction is required, at what point or points in the process must it be applied; and (3) where constitutional error has occurred, when can it be found harmless? The third question is moot if the first two questions result in a finding of no error.

A. Vague Circumstances and Limiting Constructions.

The facial inadequacy of both the "vileness" factor in *Godfrey* and the "heinousness" factor in *Maynard* v. *Cartwright* to perform the narrowing function, and hence the need for limiting constructions of both, has been reasonably clear from the very beginning. See *Gregg* v. *Georgia*, 428 U. S. 153, 201 (1976) (lead opinion); *Proffitt* v. *Florida*, 428 U. S. 242, 255-256 (1976) (lead opinion).

At the same time *Gregg* and *Proffitt* indicated that these factors required narrowing, however, they implied just as strongly that the requisite narrowing could be done at the appellate level. *Gregg* discusses the cases the Georgia Supreme Court had affirmed, noting one was "a horrifying torture-murder" and two others involved other aggravating circumstances. 428 U. S., at 201 and n. 53. For the latter two, "the Supreme Court of Georgia did not explicitly rely on the finding of the seventh circumstance when it upheld the death sentence." *Id.*, at 201, n. 53. Conspicuous by its absence from this discussion is any mention of jury instructions or harmless error. The clear implication is that the system is constitutional so long as the limiting construction is applied at some point in the state system.

Proffitt is similar. The lead opinion notes the Florida Supreme Court's limiting construction and the facts of the cases affirmed by it. *Proffitt*, 428 U. S., at 255, n. 12. There is not a hint of an implication that the *jury* must be instructed on this limiting construction.

Godfrey reinforces the implication of *Gregg* and *Proffitt* that the narrowing construction may be applied at any point in the system. The plurality opinion notes that the jury was given no guidance on the meaning of the instruction. *Godfrey*, *supra*, 446 U. S., at 429. Then, however, the plurality discusses with apparent approval the practice of narrowing the application of the circumstance on appeal in the Georgia Supreme Court. *Id.*, at 429-432. The plurality then states the question as "whether, in light of the facts and circumstances of the [case], the *Georgia Supreme Court* can be said to have applied a constitutional construction" of the challenged circumstance. *Id.*, at 432 (emphasis added).

This approval of appellate narrowing is, at least in part, why the plurality is not a majority. Justices Marshall and Brennan would have held that appellate narrowing was not sufficient. *Id.*, at 436-437 (Marshall, J., concurring in the judgment). The plurality, as the narrower of the two opinions, is controlling. See *Romano* v. *Oklahoma*, 129 L. Ed. 2d 1, 11, 114 S. Ct. 2004, 2010 (1994). As of 1980, the application of a properly limiting construction by a reviewing court was sufficient to comply with the narrowing requirement.

The last significant case before finality of Lambrix's sentence was *Cabana* v. *Bullock*, 474 U. S. 376 (1986). Bullock was sentenced to death without a finding that he personally killed the victim or attempted or intended to do so, *id.*, at 383, a requirement imposed subsequent to his sentencing by *Enmund* v. *Florida*, 458 U. S. 782 (1982). While accepting Bullock's contention that this was *Enmund* error, the Court rejected his claim that a new jury trial was necessarily required. The Court distinguished a finding required by the Eighth Amendment from elements of the offense. *Id.*, at 384-385. "At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution." *Cabana* v. *Bullock*, at 386. A federal habeas court "must examine the entire course of the state-court proceedings against the defendant in order to determine whether, *at some point in the process*, the requisite factual finding as to the defendant's culpability has been made." *Id.*, at 387 (emphasis added, footnote omitted).

"Aggravating circumstances" in Florida are also an Eighth Amendment requirement rather than an element of the offense. As of 1986, the Court had not indicated that there was any problem with the "especially heinous" circumstance beyond its inadequacy for narrowing the eligible class. Hence the "whole system" approach of *Cabana* would imply that the narrowed definition, like the *Enmund* finding, could still be made at any point in the process, as *Proffitt* and *Gregg* had said.

Cases decided after a conviction becomes final can demonstrate that a particular rule was not dictated by precedent on the date of finality. A later opinion contrary to a particular proposition, if it does not overrule or limit earlier cases, indicates that the court deciding it believes that the proposition is not dictated by the earlier cases. A statement that a question is still open necessarily means it is not dictated by precedent up to that point, and hence it was not dictated by precedent up to an earlier point, absent any intervening overrulings.

Maynard v. *Cartwright*, 486 U. S. 356 (1988) added nothing new to the question of when *Godfrey* error has occurred. The vagueness of the "especially heinous" language had been settled in *Proffitt*, and the Oklahoma appellate court had not applied a limiting construction. *Id.*, at 360. This was a case of straight,

clear *Godfrey* error. *Maynard* declined to ask whether a sentence could be affirmed despite *Godfrey* error, as *Zant* v. *Stephens* had done, for reasons peculiar to Oklahoma. 486 U. S., at 365.

Walton v. *Arizona*, 497 U. S. 639 (1990) was decided four years after Lambrix's sentence was final. *Walton* strongly reaffirms the line of authority stretching back to *Gregg* and *Proffitt* that a determination that the circumstance, as narrowly defined, is true in the individual case may be made at any point in the process.

Summarizing the *Godfrey* and *Maynard* decisions, the *Walton* majority notes that "in neither case did the state appellate court, in reviewing the propriety of the death sentence, purport to affirm the death sentence by applying a limiting definition . . . ." *Id.*, at 653. That point, as well as the jury instruction itself, was crucial to the conclusion in *Maynard*, and it was equally crucial to the opposite result in *Walton*. *Ibid.* After noting that trial judges are presumed to know and apply their state court's narrowing construction, *Walton* makes the statement:

> "Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), a state appellate court may *itself determine* whether the evidence *supports* the existence of the aggravating circumstance as properly defined *or* the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty." *Id.*, at 653-654 (emphasis added).

The disjunctive "or" is significant here. Reweighing is not constitutionally required if the appellate court determines that the facts of the case fit within the narrowed definition of the circumstance. In that event, there was no "thumb" on "death's side of the scale," cf. *Stringer* v. *Black*, 503 U. S. 222, 232 (1992), but rather a weight which properly belonged there. The original weighing is thus validated, and no reweighing is required.

Also significant is the manner which the appellate court determines the truth of the circumstance. The constitutional "harmless error" test of *Chapman* v. *California*, 386 U. S. 18, 24 (1967) is conspicuous by its absence.[4] The appellate court is not required to determine beyond a reasonable doubt what would have happened in the trial court if the narrowed definition had been applied, although that is one permissible mode of proceeding. Instead the appellate court may simply find the truth of the circumstance itself.[5]

If an appellate court's independent finding that a circumstance is true can validate an earlier weighing of that circumstance by a trial judge, it is difficult to see why a jury's weighing of a factor cannot be validated by a trial judge's finding that it is true, applying the "narrowed" definition. The superior position of trial judges in finding facts is well established. See, *e.g.*, *Miller* v. *Fenton*, 474 U. S. 104, 114-115 (1985).

A different problem would be presented if the court which applied the narrowed definition were to find that the circumstance does not fall within that definition. In that event, *Walton* indicates that reweighing is required. 497 U. S., at 654. But that is not the present case, and that is not *Espinosa* v. *Florida*, 505 U. S. 1079 (1992). In both cases the trial judge, presumably applying state precedent, found the factor true. *Id.*, at 1080; J. A. 20.

Why, then, was an independent finding of truth of the circumstance declared to be sufficient without *any* reweighing in *Walton* but held inadequate without an *independent* reweighing in *Espinosa*? The three-page *per curiam* opinion does not say. The question remains unanswered to this day.

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4. *Walton* does cite *Clemons*, which in turn refers to "harmless error." 494 U. S., at 752. That indirect reference, however, is insufficient to contradict the clear words of *Walton*, which are unmistakably inconsistent with the *Chapman* standard. Surely it is not "an illogical or even a grudging application" of *Walton* to believe it meant what it said. See *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990).

5. This presents no Sixth Amendment problem, because jury findings on sentencing issues are not constitutionally required. *Walton* v. *Arizona*, 497 U. S., at 647-649.

We might have had a better explanation if the question had been decided in *Sochor* v. *Florida*, 504 U. S. 527 (1992), a case decided on full briefing and argument. However, the *Sochor* majority found the issue jurisdictionally barred by the independent state ground of procedural default. *Id.*, at 534. *Sochor*'s carefully hedged description of the issue, *id.*, at 533, seems to imply that the question was still open three weeks before *Espinosa*.

There can be little doubt that instructing the jury with the *Dixon* language is better policy. It avoids difficulties that arise when the trial judge or the appellate court finds that the facts of the case do *not* fit that narrowed definition. For this reason, as well as *stare decisis*, *amicus* does not ask this Court to overrule *Espinosa*, and we understand the State will not be doing so either. Thus, the conduct of future Florida penalty trials will not be affected by the decision in this case.

The question, then, is whether a case in which the "heinousness factor" has been properly found to be true by an independent factfinder applying the properly narrowed definition of *Dixon*[6] was so clearly deficient before *Espinosa* as to justify overturning a final judgment. Based on the pre-finality cases of *Gregg*, *Proffitt*, *Godfrey*, and *Cabana*, and reinforced by the post-finality case of *Walton*, the *Smalley* and *Bertolotti* courts' belief that the judge's finding complied with the Eighth Amendment was eminently reasonable.

B. Harmless Error and Red Herring.

To lead the Court off the track marked by *Proffitt*, *Smalley*, and *Walton*, petitioner drags a red herring across it. He asserts, "It is clear now and it was clear in 1986 that *Godfrey* error invalidates a death sentence unless it is cured by constitutionally appropriate review." Brief for Petitioner 15. That is quite true and quite irrelevant.

As described, *ante*, at 9-14, "*Godfrey* error," as it was understood in 1986, consisted of the failure of the state court system to apply its narrowed definition at *any* point in the

6. Petitioner's contention that the trial judge did not apply *Dixon* is addressed in part IV, *infra*, at 26-27.

process. Although *Godfrey* did use the term "cured," 446 U. S., at 429, in the final analysis the question came down to whether the Georgia Supreme Court, not the jury, could "be said to have applied a constitutional construction of" the challenged circumstance. *Id.*, at 432. The *Godfrey* plurality neither holds nor implies that the state court's statutorily mandated independent review of sufficiency of the evidence would be insufficient to meet the requirements of the Eighth Amendment. Indeed, it strongly implied the opposite. *Id.*, at 429.

From the flawed premise that this case is about curing *Godfrey* error rather than the existence of *Godfrey* error, petitioner asserts that *Stringer* v. *Black*, 503 U. S. 222 (1992) has already resolved the *Teague* issues in this case. Brief for Petitioner 9. On the contrary, *Stringer* says nothing about the newness of the rule of *Espinosa*, because that rule was not involved in *Stringer*.

Stringer rejected several possible grounds for a *Teague* bar to Stringer's claim, none of which applies to the issue in this case. First, *Stringer* notes that application of the *Godfrey* rule to the circumstance "especially heinous, atrocious, or cruel" is not a new rule. *Id.*, at 228-229. Nobody claimed it was in *Stringer*, *id.*, at 228, and nobody claims it is here.

Part II B 1 of the *Stringer* opinion rejects the argument of the State and the dissent that, prior to *Clemons*, it was reasonable to believe that the harmless error rule of *Zant* v. *Stephens* was applicable in Mississippi. See *id.*, at 229-232.

> "[T]he question is whether it would have been reasonable to believe in 1985 that the holding in *Stephens* could apply to a weighing State. The majority answers these questions in the negative, saying that in 1985, no reasonable jurist could have failed to discover a concern with randomness in this Court's individualized-sentencing cases, or have failed to realize that a sentencer's weighing of a vague aggravating circumstance deprives a defendant of individualized sentencing. I think this answer endues the jurist with prescience, not reasonableness." *Id.*, at 244 (Souter, J., dissenting).

This holding is also not at issue in the present case. Neither *Smalley*, *Bertolotti*, *Glock*, nor the decision below is premised on

Zant, and the state does contend that *Zant* is applicable to Florida.

The final holding of *Stringer* is also not directly applicable, but it provides an informative contrast. Some states narrow the death-eligible class by defining a narrowed degree of murder. See, *e.g.*, *Jurek* v. *Texas*, 428 U. S. 262, 268 (1976) (lead opinion). Others, like Florida, require a finding of "aggravating circumstances." Mississippi does both.

In *Johnson* v. *Thigpen*, 806 F. 2d 1243, 1248-1249 (CA5 1986), the Fifth Circuit reasoned that the second stage of narrowing was not constitutionally required, and hence the *Godfrey* requirement of specificity was not applicable to it. The Fifth Circuit believed in 1986 that *Godfrey* was based on narrowing the eligible class. Hence, it did not apply to a circumstance in the second stage of narrowing, when the first had already fulfilled the constitutional mandate.

Stringer gives several reasons for rejecting this thesis and for holding that its rejection was not new. The predominant reason was that the Fifth Circuit's analysis was contrary to the Mississippi Supreme Court's. See *Stringer*, 503 U. S., at 234. "It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Id.*, at 235. "[W]e reiterate that the rationale of the Fifth Circuit has not been adopted by the Mississippi Supreme Court . . . ." *Id.*, at 237.

The contrast with the present case could not be more striking. Before *Espinosa*, the highest court of Florida had squarely held that the narrowed definition requirement of *Godfrey* and *Maynard* applied to the trial judge's findings and its own review, not to the jury instructions. *Smalley* v. *State*, 546 So. 3d 720, 722 (Fla. 1989). The principle of respect for the views of the state high court on its own law, so prominent in *Stringer*, cuts the other way in this case.

Two other statements in this portion of *Stringer* also merit mention. *Stringer* says that the State's reliance on a post-finality case for its *Teague* argument "is somewhat odd." 503 U. S., at 236. The Court has since abandoned this position. It is now clear that a case which "did not work a change in the law favoring criminal defendants . . . may be considered in our

Teague analysis." *Gilmore* v. *Taylor*, 508 U. S. 333, 341-342 (1993).

The other point is the citation-free paragraph on pages 235-236, which includes these statements:

> "A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance."

No precedent is cited for the rule that there is a constitutional specificity requirement for selection factors, as opposed to eligibility factors, and for good reason. There were no such precedents. This was a bolt from the blue, and it prompted the senior Associate Justices of both this Court and the California Supreme Court to conclude that the repeatedly validated system of that state had suddenly been rendered unconstitutional. *People* v. *Bacigalupo*, 6 Cal. 4th 457, 484, 862 P. 2d 808, 825 (1993) (Mosk, J., concurring and dissenting); *Tuilaepa* v. *California*, 129 L. Ed. 2d 750, 768, 114 S. Ct. 2630, 2641 (1994) (Blackmun, J., dissenting).

That conclusion, of course, would have been "at some odds with" numerous other precedents. *Tuilaepa*, 129 L. Ed. 2d, at 762, 114 S. Ct., at 2637. Reconciliation of that apparent conflict required the introduction of "a novel distinction between 'propositional' and 'nonpropositional' aggravating factors." *Id.*, at 768, 114 S. Ct., at 2641 (Blackmun, J., dissenting). *Amicus* CJLF supported that distinction as valid in *Tuilaepa*, but it was certainly not dictated by precedent eight years earlier.

The paragraph from *Stringer* not only lacks citations, but it also lacks any clear assertion that the principles stated in it were dictated by precedent existing when Stringer's conviction became final. Indeed, the paragraph notes what *Zant* cautioned *might* be required. *Stringer*, 503 U. S., at 236. "Cautioned" and "might" are a long way from "dictated." Hence, this paragraph is best interpreted as reinforcing the validity of the underlying

rule, rather than a rejection of the contention that the rule was "new."

This leaves reliance on the Mississippi Supreme Court as the principal, if not only, reason for rejection of this facet of the State's *Teague* argument. As noted above, the present case is precisely the opposite.

Petitioner insists that *both* the highest court of the state and the federal circuit which includes that state were "unreasonable" in their application to Florida of this Court's precedents through 1986. Brief for Petitioner 29 (referring to *Smalley*, *supra*, and *Bertolotti* v. *Dugger*, 883 F. 2d 1503 (CA11 1989)). This Court has previously found rules "new" for *Teague* purposes when courts were divided on the question. *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) (circuit split); *Caspari* v. *Bohlen*, 510 U. S. 383, 393-394 (1994) (state/federal split). The conclusion follows with far greater force where the state court and the circuit court were in agreement.

In summary, nothing in *Stringer* resolves the question of whether *Smalley* and *Bertolotti* were reasonable interpretations of the Court's precedents up through the date of finality of Lambrix's sentence. As we have shown in part II A, *ante*, at 9-14, those interpretations were reasonable. Although subsequent case law differs, the issue is not a fundamental one. *Sochor* v. *Florida*, 504 U. S. 527, 535, n.* (1992). There is no ground here for overturning this judgment a decade after it became "final."

III. Disapproval of previously approved practices contributes to the very problem *Furman* and its progeny set out to cure.

For three decades now, the American people have trudged the switchback trail of capital punishment jurisprudence. In their quest for a real, enforced death penalty for the very worst murderers, they have been led first one direction, then the opposite, based on conflicting signals of what the Constitution is supposed to require.

Witherspoon v. *Illinois*, 391 U. S. 510 (1968) disapproved a widespread practice in jury selection which had been expressly

approved by this Court in *Logan* v. *United States*, 144 U. S. 263, 298 (1892). See *Witherspoon*, 391 U. S., at 536-537 (Black, J., dissenting). This decision brought executions to a halt as states went about retrying cases tried in reliance on long-established precedent. The majority opinion mentioned *Logan* only in a footnote and inexplicably referred to the clear holding of that case as "dictum." *Id.*, at 523, n. 22.

The next major battle was discretionary sentencing. In *McGautha* v. *California*, 402 U. S. 183, 196 (1971), the Court addressed the claim "that the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable." Justice Harlan, writing for the majority, traced the history of capital punishment and discretionary sentencing, *id.*, at 197-206, before reaching the conclusion. "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to *anything* in the Constitution." *Id.*, at 207 (emphasis added).

The sentencing method that had been perfectly valid in May of 1971 suddenly became unconstitutional 13 months later. *Furman* v. *Georgia*, 408 U. S. 238 (1972). For the second time in four years the existing sentences, tried in a manner this Court had expressly said was constitutional, were wiped out. Again, the people had to pick up the pieces and start over.

The process of starting over was infinitely complicated by the inability or unwillingness of the Justices in the *Furman* majority to agree on a single opinion. Legislatures across America were told that vitally important statutes were unconstitutional but not told why or how to fix them. They had to guess.

The National Association of Attorneys General formed a committee to try to cope with *Furman*. See *Rockwell* v. *Superior Court*, 18 Cal. 3d 420, 447, 556 P. 2d 1101, 1117 (1976) (Clark, J., concurring in the judgment). The consensus of the nation's top prosecutors was that mandatory sentencing was needed to comply with *Furman* and that the states which had enacted "guided discretion" statutes were on shaky ground. *Ibid.*, 556 P. 2d, at 1117-1118.

This view was not limited to prosecutors. In 1976, the discretionary systems were attacked for being discretionary. See *Gregg* v. *Georgia*, 428 U. S. 153, 199 (1976) (lead opinion); *Proffitt* v. *Florida*, 428 U. S. 242, 254 (1976) (lead opinion); *Jurek* v. *Texas*, 428 U. S. 262, 274 (1976). The mandatory systems were attacked for being only "ostensibly" mandatory while actually "invit[ing] the exercise of sentencing discretion." Brief for Petitioners in *Woodson* v. *North Carolina*, O. T. 1975, No. 75-5491, pp. 18-19; Brief for Petitioner in *Roberts* v. *Louisiana*, O. T. 1975, No. 75-5844, p. 19 ("*de facto* sentencing discretion").

The "better" view turned out to be a wrong guess. Mandatory sentences were banned in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). In justifying this result, the *Woodson* lead opinion relied on *McGautha*, the very precedent so unceremoniously dumped in *Furman*. *Id.*, at 297. The lead opinion also relied on Chief Justice Burger's *dissent* in *Furman*, *ibid.*, and it noted without apology that the statutes it was striking down were enacted in an effort to comply with *Furman*. *Id.*, at 298.

Sweeping up the broken glass once again, the states endeavored to comply with what the Constitution "required" in 1976, as opposed to what it had "required" in 1972 or 1971. Unfortunately, cases tried in 1976 would later be reviewed to determine if they complied with what the Constitution would "require" in 1987.

Proffitt rejected the main attack on Florida's system, that it was unconstitutional "because it *allows* discretion to be exercised at each stage of a criminal proceeding . . . ." 428 U. S., at 254 (lead opinion) (emphasis added). *Ibid.* *Proffitt* then went on to review the essential features of the Florida system and approve the system so described.

The Florida statute specified the mitigating factors. *Id.*, at 249, n. 6. There was no catch-all factor.

> "On their face these procedures . . . appear to meet the constitutional deficiencies identified in *Furman*. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against *seven* mitigating factors to determine whether the death penalty shall be imposed." *Id.*, at 251 (emphasis added).

If that were not clear enough, the *Proffitt* Court modified its quotation of the Florida statute to insert "statutory" before "mitigating." *Id.*, at 250. Thus, the *Proffitt* Court understood the Florida system to weigh on the mitigating side a specified list of enumerated factors. If the lack of a "catch-all" factor was a constitutional defect, it was apparent on the face of the statute. Yet *Proffitt* did not see it as a defect. The Constitution did not require consideration of circumstances beyond the statutory list on July 2, 1976.

Twenty-nine days later, James Hitchcock strangled and murdered 13-year-old Cynthia Driggers. Hitchcock had molested her, and he killed her when she said she would tell. *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987). He was tried for that crime under the eminently reasonable belief that Florida law limited mitigating circumstances to the statutory list and that *Proffitt* had upheld that system.[7]

Lockett v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion) declared, out of the blue, a constitutional mandate to consider whatever factors the defendant may offer in mitigation. In an attempt to distinguish *Proffitt*, the plurality observed that *Proffitt* had noted that while the statute did not include a catch-all factor, it also did not expressly preclude nonstatutory mitigation as opposed to nonstatutory aggravation, which was precluded. This, said *Lockett* showed that *Proffitt* understood Florida to allow nonstatutory mitigation, ignoring the clear, contrary language in the body of the opinion, noted above. *Id.*, at 606, n. 15. The transparency of this evasion did not escape the Justices dissenting from *Lockett*'s new rule. *Id.*, at 629-630 (Rehnquist, J., dissenting); *id.*, at 623-624 (White, J., concurring in the judgment).

Nine years after *Lockett*, James Hitchcock's sentence was overturned because his trial judge committed the "error" of taking *Proffitt* at its word. Cynthia Driggers, dead at 13, would have been 24 by then.

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7. The actual state of Florida law at that point was somewhat ambiguous, see *id.*, at 396-397, but that is not material to the point under discussion here. Hitchcock's trial judge understood the law to be as *Proffitt* understood it.

The proponents of endless relitigation of capital cases never tire of decrying how many death sentences are "found" to contain "egregious" errors. See, *e.g.*, Brief for Benjamin Civiletti et al. in *Wright* v. *West*, O. T. 1991, No. 91-542, p. 43. The reality is that the grant rates are to a substantial extent the result of the constant "churning" of the rules governing these cases.

In *amicus*' study of Eleventh Circuit cases in 1986-89, almost half of the grants in Florida cases were for *Lockett*/*Hitchcock* "error." K. Scheidegger, Rethinking Habeas Corpus 36 (1989), reprinted in Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 1st Sess. 212, 251 (1991). That is, they were the result of state judges believing that *Proffitt* meant what it said, and a slowness to realize that *Lockett* had actually overruled a case it purported to accept.

The grant rate has fallen off almost linearly with time, from a high of 73% in the early post-*Gregg* era, see Brief for NAACP Legal Defense and Education Fund, Inc. as *Amicus Curiae* in *Barefoot* v. *Estelle*, O. T. 1982, No. 82-6080, App. E, at 6e, to only 15% in 1992. See V. Flango, Habeas Corpus in State and Federal Courts 88 (National Center for State Courts 1994); K. Scheidegger, Overdue Process, App. A, at 3-5 (1988).

While *Teague* v. *Lane*, 489 U. S. 288 (1989) had some effect on the decline, it is not the principal reason. The drop is primarily the result of the slowing pace of change in this Court's capital punishment jurisprudence. Overdue Process, App. A, at 5-8. The major questions were largely settled by 1987, see generally, Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95 (1987), but a few surprises have occurred since. The drop in the grant rate, however, has not been accompanied by a shortening of the time. The present case, involving a trial conducted nearly 13 years ago, is all too typical.

The principal vice in the pre-1972 capital punishment systems struck down by *Furman* was that the penalty was not imposed often *enough* for the broad range of cases for which it was authorized. See *Furman* v. *Georgia*, 408 U. S. 238, 309-310 (1972) (opinion of Stewart, J.) ("capriciously selected

random handful"); *id.*, at 313 (opinion of White, J.) ("grant infrequency even for the most atrocious crimes"); see also *Walton* v. *Arizona*, 497 U. S. 639, 715 (1990) (Stevens, J., dissenting). States can ameliorate this problem with regard to the proportion *sentenced* to death by narrowing the focus of capital punishment. See *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988). That effort has been largely successful. In California, for example, "death row" holds about one-quarter of all the prisoners convicted of murder with "special circumstances," *i.e.* death eligible. See Brief of the Criminal Justice Legal Foundation as *Amicus Curiae* in *Tennessee* v. *Middlebrooks*, O. T. 1992, No. 92-989, pp. 21-22.

What is largely beyond the capacity of the state to correct, however, is the small fraction of the sentences imposed which are actually carried out or the delay in doing so. In 1995, there were 3054 inmates under sentence of death, but only 56 executions. Bureau of Justice Statistics, Capital Punishment 1995, p. 1 (1996). Nearly half had been sentenced in 1989 or earlier, see *id.*, at 14, more than enough time to determine if their trials had been fundamentally fair.

As we have described above, the most diligent efforts to decipher and comply with the requirements supposedly contained in the Eighth Amendment have been frustrated by decisions which contradict clear implications, if not square holdings, of those only a few years earlier. Even today, the "somewhat contradictory" requirements, see *Romano* v. *Oklahoma*, 129 L. Ed. 2d 1, 9, 114 S. Ct. 2004, 2009 (1994), leave state legislatures and courts with the task of navigating between Scylla and Charybdis. The task is difficult enough if the channel holds still. It is virtually impossible if it moves.

A murderer should be executed or spared depending on the crime he committed, his previous crimes if any, and any mitigating facts of his background. Execution should not be a function of whether the legislature and judiciary of the state correctly predicted the next three twists in the switchback trail of capital punishment jurisprudence. Yet that is largely the situation today, when the lower courts must grapple with a body of law which has become "enormously complex . . . , posing issues which often defy clear or even sound resolution." *Flamer* v. *Delaware*, 68 F. 3d 736, 764 (1995) (Lewis, J., dissenting).

The tangled thicket of case law not only causes arbitrary execution of the penalty, it also causes extended delay in the cases that are finally executed.

> "There are powerful reasons for concluding capital cases as promptly as possible. Delay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment.[1]

"[1] *See, e.g.*, Judge Alex Kozinski [& Sean Gallagher], *Death: The Ultimate Run-On Sentence*, 46 CASE WEST. RES. L. REV. 1, [4] (Fall 1995) ('Whatever purposes the death penalty is said to serve — deterrence, retribution, assuaging the pain suffered by the victims' families — these purposes are not served by the system as it now operates.'); Justice Lewis Powell, *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989) ('[Y]ears of delay between sentencing and execution . . . undermines the deterrent effect of capital punishment and reduces public confidence in the criminal justice system')." *Gomez* v. *Fierro*, 519 U. S. ___, No. 95-1830 (Oct. 15, 1996) (Stevens, J., dissenting) (slip op., at 1).

There are several possible solutions for these problems. One is judicial repudiation of *Furman* and its progeny. Kozinski & Gallagher, *supra*, 46 Case West. Res. L. Rev., at 28. This is not likely. *Ibid*. Another is a federal constitutional amendment throwing out that body of law. Popular support for capital punishment and frustration with its lack of enforcement are high and consistent enough to make this a real possibility. See Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1994, pp. 182-183 (1995).[8]

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8. Judge Kozinski suggests narrowing the scope of capital punishment statutes. 46 Case West. Res. L. Rev., at 29-32. That would help, but no politically feasible narrowing is going to be a complete solution, or anywhere close to one. Another possibility is to accept the premise rejected in *Gregg*, "that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use." 428 U. S., at 199, n. 50. Judicial abolition has been tried before, only to be swiftly and emphatically overruled by constitutional amendment. See *id.*, at 181.

There are, however, less drastic possibilities. The federal judiciary, under the leadership of this Court, needs to recognize that the cure is now worse than the disease and reduce the dosage. Now that the states have all realigned their systems in basic compliance with the "somewhat inconsistent" mandates of *Furman* and *Lockett*, exacting federal scrutiny of the implementation of those systems in individual cases is causing more arbitrariness than it cures and greatly delaying the execution of the sentences.

The present case, if petitioner were to prevail, would be a prime example. Lambrix was tried under a system that complied with the essential structure laid out in *Gregg* and its progeny. His case was placed in the death-eligible class by numerous clear and relevant circumstances. He killed two people rather than one. A more clear, objective, and relevant basis for narrowing would be hard to imagine. He killed them because he coveted their possessions, not because they had done him any wrong whatever. J. A. 20. He killed them coldly and not in the heat of passion. *Ibid*. Death was found to be the appropriate sentence by both a judge *and* a jury who considered any and all mitigation Lambrix had to offer. J. A. 16.

Given all this, the claim that the outcome might have been different if the jury had been read narrower definitions of aggravating circumstances is gossamer thin. Yet if petitioner prevails, his case will be sent back for resentencing on stale evidence 14 years after the crime, to a prosecuting office with a load of new cases to carry. In such circumstances, it would not be unusual for the prosecution to be unable or unwilling to put forth the enormous effort to obtain the appropriate sentence a second time. A callous murderer may escape his just deserts, not because of the actual weighing of aggravation and mitigation but rather because his original trial judge was not prescient. That would be randomness, and it would be every bit as egregious as any practice struck down by any of the post-*Gregg* cases.

The first step toward a solution is for the tangled thicket to stop sprouting new branches. New requirements, including new facets of old requirements, should be announced, if at all, only after an exceedingly careful investigation of the impact of the change and the extent of the reliance interests. *Espinosa* v. *Florida*, 505 U. S. 1079 (1992) is a counterexample. The rule announced may very well be a salutary one, but the opinion displays no appreciation for the contrary implications of this Court's earlier precedents or the magnitude of the State's reliance on its reasonable interpretation of them.

The second step, and the one most pertinent to the present case, is to control the damage from past switches with a vigorous application of *Teague* v. *Lane*, 489 U. S. 288 (1989), as codified, strengthened, and expanded by Congress. See 28 U. S. C. § 2254(d), as amended Pub. L. No. 104-132 (Apr. 24, 1996), 110 Stat. 1212, 1219. The present case is a good place to start.

The third step is to carefully and selectively prune the thicket to remove its inconsistencies and lessen its complexity. This task will wait for future cases.

IV. Petitioner's claims other than *Espinosa* are not properly before the Court and are barred, meritless, or both.

This Court has granted a writ of certiorari solely on the question of the retroactivity of *Espinosa* v. *Florida*, 505 U. S. 1079 (1992). See Pet. for Cert. i; J. A. 179. The issues properly before the Court are limited to those "fairly included" in that question. Supreme Court Rule 14.1(a).

A. Dixon Error.

Trial judges are presumed to know and apply the construction placed on aggravating circumstances by their state high court. *Walton* v. *Arizona*, 497 U. S. 639, 653 (1990). Petitioner asserts with vigor that the trial judge did not apply the limiting construction of *State* v. *Dixon*, 283 So. 2d 1, 9 (1973). His sole factual basis for this assertion is a single paragraph from the judge's instructions to the jury. Brief for Petitioner 13-14, n. 9.

In effect, he contends he has rebutted the *Walton* presumption. If that were true, it would follow that the trial judge committed state-law error under *Dixon*, which would in turn constitute federal constitutional error under *Godfrey* v. *Georgia*, 446 U. S. 420 (1990) in the absence of any application of the limiting construction on appeal.

There are three answers to this argument. First, it is not fairly included in the question presented for certiorari. A factual distinction between this case and *Espinosa* has nothing to do with the retroactivity of that case. Second, petitioner's claim to have rebutted the *Walton* presumption fails on the facts. As set forth in the state's brief, the facts of this case do fit *Dixon*, and the trial judge's statement that they speak for themselves, J. A. 20, is accurate.

The third answer is that this case falls squarely within the rule of *Dugger* v. *Adams*, 489 U. S. 401 (1989). Petitioner claims a federal constitutional error based on a claimed violation of state law. Cf. *id.*, at 408. The time to make that claim was on direct appeal, over a decade ago. If Lambrix had claimed *Dixon* error on appeal, the Florida Supreme Court could have and presumably would have applied *Dixon* itself and explained in more detail why the facts fit the narrowed definition. Cf. *ibid*. As of 1986, this Court had repeatedly said that such an application on appeal was sufficient. See *ante*, at 9-14. The absence of a more express statement is the result of appellate counsel's decision not to raise it. This is an even more compelling case for application of the procedural default rule than *Dugger* v. *Adams* was.

Petitioner asserts with vigor that his default of the *Dixon* issue, and hence his default of the "straight" *Godfrey* claim, was the result of ineffective assistance of counsel. His ineffectiveness claim has been rejected and is not before this Court. See Pet. for Cert. i (Question 6). In addition, the facts of the case and their congruence with *Dixon*, as set forth in the state's brief, establish that a *Dixon* claim might very well be one that an effective appellate advocate would "winnow out" as unpromising. See *Smith* v. *Murray*, 477 U. S. 527, 536 (1986).

B. The "Coldness" Factor.

In part III of his brief, petitioner claims that the factor "cold, calculated and premeditated manner without any pretense of moral justification," is unconstitutionally vague. This argument, again, is not within the question presented. *Espinosa* did not involve that factor. See *Espinosa* v. *State*, 589 So. 2d 887, 891 (Fla. 1991). Hence, that question is irrelevant to the retroactivity of *Espinosa*. This question is not even among the questions petitioner asked this Court to review. See Pet. for Cert. i.

Petitioner's argument on the point is also remarkable for the complete absence of any mention, much less discussion, of this Court's only precedent on the issue of "coldness," *Arave* v. *Creech*, 507 U. S. 463 (1993). All murders are heinous, and all murders are vile, but not all murders are cold. *Id.*, at 475-476. Based on *Arave*, it would be reasonable to believe, even today, that the "cold, calculated, *and* premeditated" circumstance is valid on its face.

The Supreme Court of Florida has chosen, in a direct review case, to distinguish *Arave* and require further narrowing. *Walls* v. *State*, 641 So. 2d 381, 387, n. 3 (1994). That is sound policy. States need not and should not construe their circumstances to the maximum constitutional breadth. To the extent *Walls* holds that the narrower construction is required by the federal Constitution despite *Arave*, it is doubtful constitutional law. The judge/jury distinction it turns on, see *ibid.*, is not the basis of *Arave*. In any event, this issue in the present case turns not on whether *Walls* is correct but only on whether the question was susceptible to debate among reasonable minds in 1986, which it surely was. Indeed, it remains debatable today. Finally, this claim is also procedurally barred. *Lambrix* v. *Singletary*, 641 So. 2d 847, 849, n. 2 (Fla. 1994).

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be affirmed.

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Respectfully submitted,

KENT S. SCHEIDEGGER*
ERIC L. CHRISTOFFERSEN

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record